Supreme Court, U.S.
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UNITED STATES SUPREME COURT

UNITED STATES OF AMERICA

V.

RICHARD P. CONSOLE, SR.,
Appellant

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Crim. No. 91-cr-00042-1)
District Judge: Honorable Nicholas J. Politan
And on Appeal from the
United States Court of Appeals
For the Third Circuit
(No. 99-5128)

PETITION FOR A WRIT OF CERTIORARI

QUESTIONS

1. Should the US District Court have heard Appellant Console's motion to quash the IRS notice of deficiency based on substantial evidence of the IRS violations of the Secrecy of the Grand Jury proceedings prohibited by Fed.Rule 6 (e). In the alternative, should the US District Court have at least held an evidentiary hearing to determine if there was a Rule 6(E) violation.

2 Does the Third Circuit opinion in this case conflict with and overturn the decisions of the United States Supreme Court in the cases of:

USA vs. Sells Engineering 463 US 418 (1983)
USA vs. Baggot 46 US 476 (1983)
That the IRS may not violate Grand d Jury Secrecy as set forth in Fed.R.Crim. 6 (e).

3. Does the Third Circuit Opinion in this case conflict and overturn with the prior Third Circuit opinions in the cases of:

Graham vs. Commissioner of Internal Revenue 770Fed. 2nd 382 (3rd Circuit 1985)
Gluck vs. USA 771 F2d 750 (3rd CIR. 1985)

4 Does the anti-injunction Act of 1962 preclude the District Court from hearing a motion for IRS 6 (e) violation for Grand Jury Secrecy and defendant's 5th Amendment rights.

5 Has the third Circuit opinion so far departed from the accepted and usual course of judicial proceedings, or sanction such a departure by a lower court , as to call for an exercise of this Court's supervisory power.

PARTIES

1. Richard P. Console, Sr., Appellant
2. United States of America, Appellee
3. Commissioner of Internal Revenue

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STATEMENT OF THE CASE/OPINIONS AND JURISDICTION

ON January 10, 1991 Richard P. Console was indicted in a tax case docketed under 91-42(NHP). This case was assigned to Judge Politan on January 23, 1991 and then over the next four years Judge Politan conducted arraignment, set bail, ordered discovery, and inspection of the I.R.S. file, had a hearing on speedy trial waiver, had status conferences, issued a writ of habeas Corpus for Console in order that negotiations could take place over several days between the IRS and Console and his representatives in Newark. All of these actions were done pursuant to the case docketed 91-42(NHP).

ON August 22, 1995 Richard P. Console pleaded guilty to one count of tax evasion for 1986. The plea agreement provided that Console would refile his taxes for the years 1986, 1987, 1988, 1989 and pay taxes due if necessary (Emph. added)after a Civil Tax Audit. Instead the Civil Division provided Console with a Criminal Division Audit that had been based on Grand Jury Subpoena and testimony. Console made a motion for an order to show cause why the notice of deficiency issued by the IRS should not be quashed. On January 25, 1999 Judge Politan of the District Court denied the motion, ruling that the

matter was not justiciable under docket number 91-42(NHP).

The third Circuit affirmed in an opinion dated April 25, 2000. The Third Circuit en banc affirmed in a decision dated September 1, 2000.

The United States Supreme Court has jurisdiction based upon :

1. US Constitution 5th Amendment Due Process
2. FRCP 6:E (3) (A) (I) (C)
3. 26 U.S.C. 7421 (a)(Commonly known as the Anti-Injunction Act of 1962).
4. The Supreme Court cases of :
   a. USA VS. Sells Engineering, 463 U.S. 418 (1983)
   b. USA vs. Baggot, 46 U.S. 476 (1983)
5. The Third Circuit Cases of:
   a. Graham vs. Commissioner of Internal Revenue 770 Fed. 2nd 382 (3rd Circuit 1985)
   b. Gluck vs. USA 771 F2d 750 (3rd CIR.1985)

FACTS

There was substantial evidence presented in Console's Motion to the US District Court of IRS Violations of 6(e) based on the IRS's own documentation and submissions. The Criminal Division of the IRS and the Federal prosecutors produced a 4 page audit in 1995 that was based on Grand Jury testimony and Grand Jury subpoenaed documents. The criminal division audit was used to get an indictment against Console on January 1991. This was long before the Civil Division was involved in this case. This was long before District Court Judge Politan required a Civil Division Audit in August 1995, which would be independent of the criminal division audit to avoid a 6(e) violations, before Console was required to pay any taxes.[1]

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[1]The 3rd Circuit opinion misquotes the plea agreement reached under the auspices of Judge Politan. The plea agreement clearly states that Console shall "file amended personal returns if necessary after a civil audit to pay all taxes and penalties owed." The opinion mistakenly states "As part of the plea agreement Console agreed to file amended returns for 1986-1989 after a civil audit, if necessary, and to pay all taxes and penalties owed." (See A7-9)The opinion mistakenly misquotes the plea agreement causing the words "if necessary" to apply to the civil audit not to Console's payment of taxes. Clearly the District Court required an independent civil audit different from the criminal division audit presented to the District Court when the plea agreement was negotiated in 1995. The District Court was not saying that Console was to file amended returns after a civil audit which

might or might not be necessary. The District Court was saying that after a civil audit it might be necessary for Console to pay taxes. This error in the opinion goes to the very heart of this

This was long before the civil division began their alleged independent audit produced in October 1996.

The IRS Civil Division , that was prohibited from using such Grand Jury testimony and documents, produced the exact same audit in October 1996 that was the criminal division audit produced in 1990 that gave rise to the January 1991 criminal indictment against Console. Actually, it was physically the same audit just signed by a civil agent.(See Exhibits G,H,I.A19 thru A31, in Console's Appellant brief) which involved the same thousands of involved calculations. Furthermore, Console produced the criminal agent's report detailing how $272,623.50 , of Console's reviewed checks were allowed, and, $1,246,097.54 were disallowed, along with an extensive explanation of how these decisions were based on particular witnesses who appeared before the Grand Jury and the Grand Jury subpoenaed documents. In October of 1996 the civil Division simply signed the Criminal Division audit which was based on Secret Grand Jury material of 1991. Th IRS Civil Division now claims that they miraculously allowed the same $272,623.50 and disallowed the same $1,246,097.54 of corporate checks in each individual year independent of the IRS criminal

Grand Jury investigation. Console did not request the Appellate Court to rule on the evidence, Console merely requests an evidentiary hearing in the District Court to determine if the Supreme Court prohibition against the IRS using Grand Jury Materials has been violated.

ARGUMENTS

There is a line of Supreme Court cases that prohibits the IRS from using Grand Jury materials for their audits. In US vs. Sells Engineering 463US 418(1983) the Court held that under Fedr.R.Crim.P.6(e)(C0(I) attorneys for the civil division are not entitled to Grand Jury materials as of right, but rather must seek a court order upon a showing of particularized need. Moreover, this need must be compelling enough to demonstrate that disclosure outweighs any continued interest in Grand Jury Secrecy.Id.at427. To hold otherwise, the Supreme Court stated, would encourage prosecutors to use the Grand Jury as a means for gathering evidence for civil proceedings and would permit the government a form of broad EX-Parte discovery Id.at 427. In the case now before this court there was no such Court order granting access to

the Grand Jury materials.

Most importantly, the Supreme Court ruled in US vs. Baggot that the IRS cannot legally obtain such an order under Fed.R.Crim.P. 6(e)(C)(I). The Supreme Court in US vs. Baggot held that the IRS audits are not Judicial Proceedings within the meaning of Fed.Rule 6(e). Rather,

the Court reasoned that since the IRS need never got to the Court to access and to collect money owed, the process is an extrajudicial one and therefore not within the scope of the rule. Therefore, the IRS can never avail itself of the Rule 6(e) exception to obtain Grand Jury materials.

Of course both the Baggot and Sells engineering cases were appeals from District Court and Appellate Court determinations on this very issue. The Anti-Injunction Act was passed more than 20 years before the Baggot and Sells Engineering cases. If the IRS Anti-Injunction argument was valid there could never have been a Baggot or Sells Engineering decision. Accordingly, the District Court in Baggot and Sells Engineering had jurisdiction to rule on a 6(e) violation in spite of the Anti-Injunction Act. Therefore the District Court would have the jurisdiction to rule in this case.

The 3rd Circuit has followed the Supreme Court. In 1985, in the case of Graham vs. Commissioner of Internal Revenue 770 Fed.2d 382 (3rd Circuit 1985), the Third Circuit reviewed a case in which materials and testimony before the Grand Jury were used by the IRS Civil Division to form a Notice of Deficiency. Although the Court did

not apply Baggot retroactively (as no Court did), the Third Circuit stated that the information obtained from Grand Jury materials that

formed the basis for a statutory Notice of Deficiency obtained by F.R.C.P. 6(e) order would now be invalid under Baggot. In Graham the Court reasoned that the IRS agents acted in good faith reliance on a 6(e) order obtained prior to the Baggot Holding. There is no such good faith reliance on a 6(e) order before this Court.

II

The opinion in our case completely ignores the Supreme Court and Third Circuit precedents. Without accepting or rejecting these precedents. The opinion is based on an Anti-Injunction Act case of 1962, over 20 years prior to Baggot , Sells Engineering, and Graham.

The only question before the Third Circuit was whether the alleged IRS 6(e0 violations were justiciable and could be heard in the District Court.

Console simply asked that the District Court hold an evidentiary hearing to investigate the apparent IRS 6(e) violations.

The opinion avoids the central issue of this case by citing the Anti-Injunction Act statute which states:

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person".

The opinion sites the case of Enoch vs. Williams Packing CO. 370 US1 ,7 1962. In 1962 the Supreme Court said " the manifest purpose of the Anti-Injunction Act 26USC 7421(A) is to permit the United States to assess and collect taxes alleged to be due, without Judicial interventions, and to require that the legal right to the disputed sums to be determined in a suit for refund. The exception to this Rule is"if it is clear that under no circumstances could the Government ultimately prevail...and...equity jurisdiction otherwise exists".

The IRS argues in this case that the Anti-Injunction Act of 1962 limits the District Court to contempt of Court as its only remedy. The IRS also quotes cases allowing injunctions to enjoin unauthorized disclosure or to enjoin future violations, and argues that no further remedy is available. Of course neither remedy is applicable to the case at bar where the Grand Jury was disbanded approximately decade ago and the prosecutor and the IRS agents have retired.

Console however is not requesting an injunction to stop the assessment and the collection of taxes, he simply asks that the District Court enforce the Supreme Court prohibition as set forth in Baggot and Sells Engineering, and fashion the appropriate remedy as the Third Circuit ruled in the case of Gluck vs. U.S.A. 771 F2d 750 (3rd CIR. 1985). In Gluck, the Third Circuit stated that:

"The Court of Appeals could still fashion a remedy, namely prohibition of government's use of information obtained from summoned documents, if the Court of Appeals found that summonses were illegal."

The Third Circuit in the Graham case referred to the Gluck case approvingly and indicated that although Gluck referred to illegal summonses rather than a Notice of Deficiency. Graham was a case, like the case at bar that involved a statutory Notice of Deficiency. In Graham the Third Circuit ruled that:

:Although this case arises out of proceedings to determine deficiencies in the Tax Court, while Gluck involved the enforcement of summons, in the District Court, we hold that this difference in procedural position is inconsequential".

The present opinion, without a hearing to review testimony and all relevant evidence, attempts to make the District Court decision for it. While ruling that the matter is not justiciable before the District Court, the opinion states "that the figures are in the indictment" and " there is a letter form the IRS civil agent that he did his 1996 audit from the public records". However, this was exactly the question before the District Court. Was there an independent IRS Civil audit not based on prohibited Grand Jury material. This is the exact question that gives rise to whether the IRS Notice of Deficiency and supporting audit are in violation of the Supreme Court cases of Baggot and Sells Engineering and the Due Process clause of the 5th Amendment.

CONCLUSION

With the passage of the Tax Payer's Bill of Rights and the congressional hearings attendant there to the Supreme Court must be cognizant that the IRS abuses such as outlined herein are questions of importance for the nation and this Court. Chief Justice Rehnquist 's statement in the recent Miranda decision that "Miranda, being a constitutional decision of this Court, may not be in effect overruled by an act of Congress, and we decline to overrule Miranda ourselves", is applicable in our case. As in the Miranda decision this case pits the Congressional Anti-Injunction Act of 1962 squarely against a line of Supreme Court decisions in the cases of Sells and Baggot, decided twenty years later in 1983, and the Due Process clause of the 5th Amendment.

IN the third Circuit opinion in this case, the question of whether the Anti-Injunction Statute and the Enoch Case of 1962 negate the Supreme Court and the Third Circuit prohibitions of the Baggot , Sells Engineering of 1983, and

the Graham case of 1985 is never addressed or resolved. The question of whether the IRS agents violated Criminal Rule 6(e) is never heard.

It is not up to the Third Circuit to make that determination without a hearing. If the IRS has violated Supreme Court 6(e) prohibitions, this should be decided in the District Court with a hearing. Console simply asks that the District Court hold an evidentiary hearing to investigate the IRS apparent 6(e) violation.

If the Court rules in favor of the IRS, they are allowing the IRS to ignore the Supreme Court rulings in Sells Engineering and Baggot, and simply use the Grand Jury Materials with impunity, because there would be no effective remedy to prohibit them.

As in the cases presently before the United States Supreme Court, involving the Miranda Decision and Congressional legislation related there to, this is a case of Constitutional Dimension and cannot be nullified by prior legislation. As in the recent Supreme Court decision in Hubble, the Supreme Court will hear cases to protect an individual's 5th Amendment rights against the IRS.

For the foregoing reasons the January 25, 1999 order should be vacated and this matter remanded to the District Court to quash the IRS Notice of Deficiency and

or hold an evidentiary hearing o9n the apparent IRS Grand Jury 6(e) Violations.

APPENDIX

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	:	CRIMINAL ACTION NO. 91-42
Plaintiff,	:	HON. NICHOLAS H. POLITAN
v.	:	**FINAL ORDER**
RICHARD P. CONSOLE,	:	
Defendant.	:	

THIS MATTER having come before the Court on Console's Motion for an Order to Show Cause Why Notice of (IRS Tax) Deficiency Should Not Be Quashed; and it appearing that the claims presented in the instant motion are not justiciable under Criminal Action Number 91-42;and for good cause shown;

IT IS on this 25th day of January, 1999,

ORDERED that Console's Motion for an Order to Show Cause Why Notice of Deficiency Should Not Be Quashed be and hereby is DENIED.

/S/

NICHOLAS H. POLITAN

U.S.D.J.

A1

UNREPORTED- NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 99-5128

UNITED STATES OF AMERICA

v.

RICHARD P. CONSOLE, SR.,

Appellant

On Appeal From the United States District Court

For the District of New Jersey

(D.C. Crim. No. 91-cr-00042-1)

District Judge: Honorable Nicholas J. Politan

Submitted Under Third Circuit LAR 34.1(a)

Before: MANSMANN, MCKEE and STAPLETON, Circuit Judges.

(Filed: April 25, 2000)

OPINION

PER CURIAM

Richard P. Console appeals from the judgement of the District Court denying his

motion for an order to show cause why the notice of [IRS tax] deficiency should not be quashed. For the following reason we shall affirm.

I

In 1995 Console pled guilty to evading his tax liability for the year 1986; the remaining counts of the indictment were dismissed. The court sentenced Console to a three years sentence to be served concurrently with a sentence previously imposed for a prior mail fraud conviction. As part of the plea of the plea agreement Console agreed to file amended returns for 1986-1989 after a civil audit, if necessary, and to pay all taxes and penalties owed.

In April 1997 the IRS issued a statutory notice of deficiency determining deficiencies with regard to Console's tax liabilities for 1986-1992. After seeking redetermination of the deficiency in the United States Tax Court, Console filed a motion in the closed criminal tax case seeking an order directing the IRS to show cause why the notice of deficiency should not be quashed. Console claims that is "patently obvious" that the IRS violated Fed. R. Crim. P. 6(e), which protects the secrecy of grand jury proceedings, by improperly using grand jury materials in computing Console's tax liability: the dollar amounts in the notice of deficiency are identical to those handed down in the grand jury indictment, as well as to the figures provided by an IRS agent in the criminal phase of the proceedings. According to Console, since the IRS has provided no reasonable

explanation for how it calculated his tax liability , the only reasonable inference is that its computation was based on secret grand jury materials. Console wants the District Court to quash the notice of deficiency as a remedy for the alleged Rule 6(e) violation. The District Court denied the motion, finding that "the claims presented in the instant motion are not justiciable under Criminal Action Number 91-42.

II

Pursuant to the Anti-Injunction Act, 26 U.S.C. § 7421(a) federal courts generally may not grant such equitable relief as Console is seeking. As the supreme has explained: "The manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums to be determined in a suit for refund." Enochs v. Williams Packing Co., 370 U.S. 1, 7 (1962). The exception to this rule is "if it is clear that under no circumstances could the Government ultimately prevail ... and ... equity jurisdiction otherwise exists." Id.

Console's case does not fit the exception. The fact that the amounts in the notice of deficiency are the same as the amounts calculated in the criminal does not, without more, demonstrate that the former were determined in violation of Rule 6(e). As Console notes, the relevant figures on which the amounts in the notice of deficiency are bases are laid out in the indictment, which is a

public document. In addition, the record includes a letter to Console from the IRS agent who worked on the civil case explaining that his tax deficiency was determined from public records, not in violation of Rule 6(e). For these reasons and because Console does not appear to be challenging the accuracy of the amounts in the deficiency notice, it is hardly "clear that under no circumstances could the Government ultimately prevail."

Accordingly, we shall affirm the judgement of the District Court.

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

99-5128

United States Of America

v.

Richard P. Console, Sr.,

PRESENT: BECKER, Chief Judge, SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBROS, FUENTES, Circuit Judges

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SUR PETITION FOR PANEL REHEARING

WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for

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rehearing is DENIED.

BY THE COURT:

/S/

Circuit Judge